IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

NO. 1301

ALEXANDER TCHEREPNIN, MING TCHEREPNIN, CHARLES NOLL, MAYBELLE NOLL, HARRY BLOCK, JEANETTE A. BLOCK, WERNER D. BLOCK, ADRIAN DA PRATO, PETER DA PRATO, FREDERICK D. WAHL, ANNE W. WAHL, THEODORE MACHATKA, MARIE B. MACHATKA, JOSEPH NOVAK, FRANCES NOVAK, MARYBETH SIMJACK, WALTER R. ANDERSON AND HELEN K. KELLOGG,

Petitioners,

VS.

JOSEPH E. KNIGHT, JUSTIN HULMAN, CITY SAVINGS ASSOCIATION, DENNIS KIRBY, HARRY HARTMAN, LOUIS KWASMAN, ROBERT FRANZ, STANLEY PASKO, JOSEPH TALARICO, JR., HERBERT J. HOOVER, ROBERT M. KRAMER, C. ORAN MENSIK AND GLORIA MENSIK SPRINCZ,

Respondents.

(On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit)

RESPONDENTS KNIGHT'S AND HULMAN'S BRIEF IN OPPOSITION

OPINIONS BELOW.

The opinion of the United States District Court has not been reported. It is printed in its entirety in the Joint Appendix filed in the court below at page 34.

The opinion of the United States Court of Appeals for the Seventh Circuit and the dissenting opinion (*App. to Petition,* pp. 20-42) are reported at 371 F.2d 374.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a withdrawable capital account in an Illinois-chartered savings and loan association is a "security" within the meaning of that term as it is used in the Securities Exchange Act of 1934?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Securities Exchange Act of 1934 (48 Stat. 881, as amended, 15 U.S.C. § 78 a, *et seq.*) and the regulations involved (17 C.F.R. § 240, 10 b-5) are set forth in the Appendix to the Petition filed herein, at pages 43-45, with the exception of Section 2 of the Securities Exchange Act of 1934 (15 U.S.C. § 78 b) which is set forth in the Appendix herein at page 11.

STATEMENT OF THE CASE

The opinion of the Court of Appeals for the Seventh Circuit has adequately set forth the Statement of the Case in the instant action (*App. of Petition,* pp. 20-22).

ARGUMENT

The issue in the present case is narrow and does not warrant review by this Court on *certiorari*. On the interlocutory appeal where the question presented in this case was certified to the Court of Appeals for the Seventh Circuit, the court correctly ruled that withdrawable capital accounts, more commonly known as savings accounts, are not "securities" within the meaning of that term as it is used in the Securities Exchange Act of 1934. Basing its decision on Congressional intent, as drawn from testimony in Congressional hearings and the history of federal regulation of securities the court concluded that the nature of such an account was not intended to be covered by the 1934 Act. Obviously, no important question of federal law requiring decision by this Court is presented by this narrow proposition.

Moreover, there is no asserted conflict of decision anywhere on this limited point. The decision below is consistent with the interpretation of this field by this Court, and the several Courts of Appeals.

REASONS FOR DENYING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS CLEARLY CORRECT.

The decision of the Court of Appeals, after an exhaustive analysis of federal regulation of the securities industry by Congress and the opinions of this Court relating thereto, concluded that a withdrawable capital ac-

count, more commonly known as a savings account, in an Illinois-chartered savings and loan association was not a "security" within the meaning of that term in the Securities Exchange Act. Being a case of first impression the court below carefully reviewed the Congressional hearings from 1933 to 1964 regarding securities regulation. There is no doubt that savings accounts in state savings and loan associations were well known by Congress, as evidenced by the hearings preceding the enactment of the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*) and the Securities Exchange Act of 1934 (*App. to Petition*, pp. 26-27). The inescapable conclusion was that there was no intent to include regulation of such savings accounts under the Securities Exchange Act of 1934. Such accounts have the characteristics most closely resembling the short-term debtor-creditor transactions which were specifically excluded from the definition of the term "security" in the 1934 Act (15 U.S.C. § 78 c (a) (10)). Again, in 1963, prior to the enactment by Congress in 1964 of amendments to the Securities Exchange Act of 1934, hearings were held and testimony was offered by both Professor William L. Cary, then Chairman of the Securities and Exchange Commission, and Mr. Milton Cohen, Director of a Special Study of the Securities and Exchange Commission. Both Messrs. Cary and Cohen and the technical statement submitted by the SEC argued that share accounts (as opposed to other categories within savings and loan associations) were not to be covered by such amendments nor were they within the coverage of the 1934 Act (Cf. 15 U.S.C. § 78 l (g) (2) (C)). Mr. Cohen said:

> "[I]n many of these organizations the person who has an interest in the association is in the nature of a savings—a savings interest. He doesn't have any-

thing that he can usually transfer, as he can a share of stock, but in more recent years there has been a development in this area whereby stock in these organizations have been created for sale to the public as an investment. It is in this particular area that attention is being given to them within the purview of the securities acts." Hearings on H.R. 6789, H.R. 6793 and S. 1642 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., pp. 272-273." (Also see House Hearings, *supra*, at p. 1361.)

The awareness of Congress of the existence of savings accounts in the early years of regulation of the securities field distinguishes such accounts from all sorts of schemes, "many of them of the Alice in Wonderland variety" which are clearly the forms of transactions that were to be regulated. See *S.E.C.* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) and *S.E.C.* v. *W. J. Howey Co.*, 328 U.S. 293 (1946) as discussed by the court below.

It was also indicated in the opinion by the Court of Appeals that the most striking analogy to a savings account in City Savings Association (a mutual savings and loan association chartered by the State of Illinois) was to an insurance policy in a mutual insurance company. Since such an insurance policy was not to be considered a "security" within the meaning and intent of the Securities Exchange Act savings accounts were likewise not such "securities".

Therefore the court properly decided that savings accounts were not intended by Congress to come within the ambit of the Securities Exchange Act of 1934 (Cf. Preamble of said Act, 15 U.S.C. § 78 b, *App.* herein, 11 *et seq.*)

II.

WITHDRAWABLE ACCOUNTS ARE NOT INCLUDED BY THE TERMS OF THE ACT ITSELF.

It has been established that Congress did not intend to include withdrawable accounts in savings and loan institutions within the coverage of the anti-fraud provisions of the Securities Exchange Act (15 U.S.C. § 78 j (b)). The definition of a "security" for the purposes of this Act makes it clear that Congress has not done so.

Section 3(a) (10) of the Securities Exchange Act (15 U.S.C. 78c (a)) defines the term "security" as follows:

> (10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization, certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

It is to be noted that unlike the instruments included in this definition a withdrawable account has a fixed, rather than a fluctuating, value, is not transferable, is withdrawable in full at any time upon giving reasonable notice and is increased by dividend payments at a fixed rate in the nature of interest, which rate is usually competitive with

other savings and loan associations and banks in the area. The only risk taken is when the association ceases to be a going concern. This occurred in this case, when the state authorities took custody and prevented any further withdrawal of the association's assets to protect all of its depositors. A risk of this nature may result even from the failure of institutions involved in the short-term debtor-creditor transactions specifically not included in the statutory definition of "security".

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW NOR ANY CONFLICT OF DECISIONS BETWEEN THIS OR ANY OTHER COURT.

Simply stated, the Court of Appeals ruled that a withdrawable account was not a "security" under the Exchange Act. No other question was involved. No *dicta* in the case limits or extends the construction of the definition of the term "security" as it is used in the 1934 Act. The court below, within the confines of the interpretations as set forth in the decisions of this Court relating to the Securities Act of 1933 [*S.E.C.* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943); *S.E.C.* v. *W. J. Howey Co.*, 328 U.S. 293 (1946); *S.E.C.* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959)] properly interpreted this narrow area of the Securities Exchange Act as determined from the intent of Congress and this Court's opinions. The decision merely follows the long standing notion that withdrawable accounts, like savings accounts, are not covered by the 1934 Act. Such a limited point clearly is not the type of issue that would require the granting of *certiorari*. Petitioners have cited no other case that is in conflict with the holding of the court below.

State savings and loan associations are under strict supervision and control of state agencies. Not being private enterprises, they are regulated as quasi-public institutions. *Hopkins Federal Savings & Loan Ass'n* v. *Cleary,* 296 U.S. 315, 328-329 (1935). The state has a peculiar interest in the concommitant power of supervision and regulation of savings and loan associations to prevent injury and loss to the members of such associations. Depositors holding savings accounts are manifestly protected by state authority. See also *Variable Annuity, supra,* at 68, 74 (concurring opinion), 99-101 (dissenting opinion).

It would create severe hardship on many individual depositors if petitioners would prevail in the instant case since a number of depositors of the City Savings Association would be treated far differently from the petitioners in this case. Petitioners are seeking to receive a far greater return than the many depositors who would not come within the restrictive confines of petitioners' position. Such a result would be contrary to the intended purposes of the Exchange Act. Consequently the state officials are seeking to have all depositors be treated equally rather than to prefer some over others.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of *certiorari* be denied.

Respectfully submitted,

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